U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: LIN 02 170 54010 Office: NEBRASKA SERVICE CENTER Date: MAR 30 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty chef. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the petition's priority date is April 20, 2001. The beneficiary's salary as stated on the labor certification is $15.00

per hour for a forty hour work week, which equates to $31,200.00 per annum.

With its initial petition, counsel for the petitioner provided a Profit and Loss Statement for 2001, a compilation prepared by an accountant of the petitioner's assets, liabilities, and stockholder's equity for the year 2000, and a copy of its Single Business Tax Return from the State of Michigan for the year 2000. The director found that none of these documents established the petitioner's ability to pay the proffered wages as of the priority date. On June 26, 2002, the director issued a request for additional evidence specifically requesting regulatory-sanctioned evidence such as complete tax returns with all schedules and attachments, audited financial statements, or copies of annual reports.[1]

In response to the director's request, counsel submitted a copy of the petitioner's federal tax return for the year 2001, corporate bank statements for the period from January to June 2002, and a copy of an executed promissory note and loan commitment. In addition, counsel supplied copies of federal tax returns for two other businesses owned and operated by the petitioner's president. The director found this additional evidence to be deficient, and consequently issued a denial of the petition on December 4, 2002.

In response to the denial, counsel filed a Motion to Reopen on December 31, 2002, which was granted by the director. The Motion alleged, in pertinent part, that the petitioner's ability to pay was established as a result of a collective examination of its revenues and the revenues and assets of two additional restaurants which were owned and operated by the petitioner's president, as evidenced by the federal tax returns for these restaurants previously submitted. Counsel further alleged that the director should treat the petitioning corporation as a sole proprietorship for purposes of financial analysis, and therefore consider all personal assets of the common shareholder and his wife. The director upheld its denial, stating that counsel's arguments were inapplicable since the

---

[1]The director also requested evidence of the beneficiary's date of birth and a statement that the beneficiary is in the United States and will apply for an adjustment of status. These issues were resolved to the satisfaction of the director, and since the denial of the petition was not based on either of these issues, it is not necessary to discuss them within the scope of this decision.

petitioning entity was an established corporation, and therefore could not be treated as a sole proprietorship.

On March 10, 2003, the petitioner's counsel filed an appeal brief and supporting documentation with the AAO.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage. Specifically, the petitioner's net income of $4554.00, as set forth on its 2001 tax return, was substantially less than the proffered wage of $31,200.00. Consequently, the petition was denied.

On appeal, counsel urges this office to consider the combined income and assets of three separate entities, all owned by the president of the petitioning corporation, in analyzing the petitioner's ability to pay the proffered wage. In addition, counsel asserts that the inclusion of corporate bank statements and evidence of a previously issued loan in the form of a promissory note should be sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period. The arguments of counsel are not convincing, because despite the inclusion of numerous forms of financial documentation from a combination of entities, the primary issue to be determined is whether the petitioner alone had the ability to the proffered wage during the relevant time period.

A review of the petitioner's 2001 federal tax return reconfirms the director's finding of insufficient funds to pay the proffered wage. Specifically, the petitioner has neither enough net income

($4,554.00) nor net current assets ($4,931.00)[2] as of the priority date to pay the proffered wage. There is no additional evidence in the record that establishes the ability of the petitioner to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

Although it is undisputed that the petitioner is a corporation, counsel's main argument on appeal is that the office should consider the combined proceeds and assets of three entities: the petitioner, a second corporation, and a sole proprietorship. Counsel's position is that since the petitioner's president is its sole shareholder, and is also the sole shareholder of the other two entities, the three distinct businesses should be considered as one for purposes of financial analysis. The director rejected this argument, and the AAO concurs with its decision. Counsel cannot rely on the revenue of two additional and distinct business entities as a means of establishing the petitioner's ability to pay, for this position clearly contradicts the established legal practices and treatment of business organizations.

Contrary to counsel's primary assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel asserts that the petitioner's president is its sole shareholder, as well as the sole shareholder or owner of two other restaurants.[3] However, he personally is not the petitioner named

---

[2] This figure is obtained by subtracting current liabilities of $4,743.00 (lines 16-18 on Schedule L) from current assets of $9,674.00 (lines 1-6 on Schedule L).

[3] This assertion has not been proven. Although counsel has submitted copies of stock certificates showing the number of shares that the petitioner's president owns in each entity, this evidence alone is insufficient to warrant a conclusion that the petitioner's

in the petition. The actual named petitioner is a corporation, and therefore, for purposes of this decision, the law pertaining to corporations is controlling. Counsel's argument is misapplied in this case, but would certainly be persuasive in a situation where the petitioner was an individual or a sole proprietorship.[4] The petitioner is a corporate entity, and therefore it is irrelevant whether its president owns majority shares in other restaurants or has substantial personal assets.

Moreover, counsel alleges in his appeal brief that the three restaurants are "affiliated companies" as a result of the involvement of the petitioner's president in each business. Citing The Investment Company Act, 15 U.S.C.A. § 80a-2, counsel provides the definitions of "affiliated company" and "affiliated person," and concludes that the three restaurants are affiliated by definition since "an affiliate company is recognized as a company effectively controlled by another company." Relying on these definitions, counsel concludes that it would be appropriate to review the collective revenue of all three restaurants in determining the petitioner's ability to pay. The language in 15 U.S.C.A. § 80a-1(b) states:

---

president is in fact the petitioner's sole shareholder. No additional documentation is present in the record that confirms the number of shares outstanding and/or the aggregate number of shares the petitioner has the authority to issue. The only evidence in addition to the stock certificates is a statement by counsel that the petitioner is the sole shareholder. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In any event, the question of whether the petitioner's president is its sole shareholder is irrelevant to these proceedings, since the petitioner is a corporation and will be treated as such when analyzing its ability to pay the proffered wage.

[4] For example, if the petitioner in this case was a sole proprietorship, the office could consider the sole proprietor's income, including officer's salaries received for positions held with other corporate entities, as well as personal assets. In this case, however, the petitioner identified in the petition is a corporation. Consequently, counsel's reasoning is flawed.

> It is declared that the policy and purposes of this subchapter, in accordance with which the provisions of this subchapter shall be interpreted, are to mitigate and, so far as is feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors.

Clearly, this section of the United States Code is intended to regulate the actions of investment companies in commerce and trade. Consequently, counsel's reliance on the definitions cited is erroneous with regard to the present analysis of the petitioner's ability to pay the proffered wage. The fact that the three restaurants may be affiliated under the definitions of the above-referenced subchapter does not supersede the fundamental rules of corporate law. The office, therefore, may not pierce the corporate veil and look to the assets of the petitioner's president as evidence of the petitioner's financial state.

Finally, counsel for the petitioner asserts that consideration should be given to the petitioner's bank statements and an outstanding loan as additional means of establishing the petitioner's ability to pay the proffered wage. With regard to the bank statements, counsel is advised that there is no proof that the funds identified in these documents represent additional funds beyond those of the tax return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Bank statements, without more, are unreliable indicators of ability to pay because they do not identify funds that are already obligated for other purposes. Although the petitioner submitted copies of its 2002 commercial bank statements for the period from January to June, two of those months, February and March, displayed negative balances. With regard to the promissory note evidencing an outstanding loan, the AAO notes that the creditor named in the note is not the petitioner, but rather the petitioner's president and alleged sole shareholder. The assets of a corporation's shareholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage; therefore, any income generated from the collection of this promissory note will not be considered.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). After a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.